IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPEAL NO.285 OF 1994

1. Maruti Baba Medhekar
2. Vasant Kashinath Kudav .. Appellants (Org.Accused Nos.1 & 2)

Vs.

The State of Maharashtra .. Respondent

Mr. P.P. Hudlikar for appellants.
Mr. V.B. Konde-Deshmukh, APP for Respondent.

CORAM : S.S. PARKAR & S.R. SATHE, JJ.

Date : November 29, 2004.

ORAL JUDGMENT (Per S.S. Parkar,J.) :

1. This appeal is filed challenging the Judgment and Order dated 30th March, 1994 delivered by the Addl. Sessions Judge, Gr. Bombay convicting the appellants for the offence under Section 302 read with Section 34 of IPC and sentencing both of them to undergo life imprisonment in Sessions Case No.177 of 1982.

2. Briefly stated the facts leading to the present appeal are as under :-

. The dead body of deceased Ashok @ Ramchandra Velunde, the brother of complainant PW 1 Laxman, was

noticed by the members of the public in the morning of 11th November, 1981 in the open place between railway line and the compound of the Wellington Gymkhana, also known as Khar Gymkhana. PW 7 Constable Kapdi attached to Traffic Branch, "M" Division and posted at Khar Subway on that day saw a crowd collected between railway line and Willington Gymkhana. Seeing the crowd he went there and found a dead body of a male person aged between 18 to 20 years lying there. He noticed that the throat of the dead body was slit and a piece of cloth pressed into the mouth of the dead body. Sensing that the said person must have been murdered, PW 7 went to Willington Gymkhana and telephoned to control room giving the information about the dead body. Pursuant to the telephone call PSI Kakade of Bandra City Police Station visited the scene of offence and recorded the complaint of PW 7 Kapdi which is at Exh.19. PW 2 Gangubai also learnt about the dead body lying near the railway track and, therefore, she went to the said place and found the dead body of her brother deceased Ashok. Inquest panchanama was drawn on the dead body which is at Exh.11. The dead body was identified by Gangubai of her brother Ashok. Spot panchanama Exh.12 was drawn. The clothes of the deceased were attached under panchanama. The Investigating Officer went to the

house of PW 1 Laxman Velunde, the brother of the deceased, same evening. He recorded the statements of PW 1 Laxman, PW 2 Gangubai, PW 3 Anandibai as well as the husband of Gangubai i.e. Ganu Paraskar and Kumari Nanda Laxman Kulye that evening. From the place of incident three lemons lying near the dead body were also attached under spot panchanama. Both the appellants-accused came to be arrested on 15/11/1981 under arrest panchanama Exh.21. Search of the house of accused was taken under panchanama Exh.22 but nothing incriminating was found. In the pocket of the deceased some chit was found which was sent to the hand writing expert which bore the name and address of the deceased. The post-mortem of the dead body was performed on 12/11/1981. After investigation was over, charge-sheet came to be filed on 15/3/1982 in the Metropolitan Magistrate's 12th Court, Bandra and the case was committed to Sessions Court on 5/4/1982.

3. Before the Sessions Court, charge came to be framed for offence under Section 302 read with Section 34 of IPC against both the appellants, to which they pleaded not guilty. On behalf of the prosecution 12 witnesses have been examined. PW 1 is Laxman Vithu Velunde, the brother of the deceased, who is the main witness. PW 2 is Gangubai Ganu Paraskar, the sister

of the deceased. PW 3 is Anandibai Laxman Kulye, who was residing with the deceased Ashok and Gangubai. PW 4 is Uttam Dhondiba Pawar, the panch for the inquest panchanama. PW 5 is Kasim Umar Ali, the panch for attachment of the clothes of the deceased. PW 6 is Anand Jagsi Salia, the employer of the deceased in whose shop deceased was working. PW 7 is Constable Gahininath Rambhau Kapdi, who lodged complaint after seeing the dead body. PW 8 is Head Constable Sudam Pandarkar, who took the dead body to the Coroner's Court. PW 9 is Janardhan Narayan Patil, who was working with the deceased Ashok in the grocery shop. PW 10 is Ramchandra Bayaji Kale, the panch who turned hostile. PW 11 is Somnath Dasharath Gaikwad, who prepared the inquest panchanama and lastly, PW 12 is PI Sadashiv Krishnaji Nalavade, who investigated the case. The defence of the accused was of total denial.

4. The trial court after considering the evidence on record convicted both the appellants for offence under Section 302 read with Section 34 of IPC and sentenced them to undergo life imprisonment. The said order is impugned in this appeal filed by both the convicted accused.

5. After taking us through the evidence of

prosecution witnesses, the learned counsel appearing for accused contended that the solitary circumstance relied on by the trial court is that the appellants were last seen together in the company of the deceased on the basis of which the appellants have been convicted. He firstly submitted that on the single circumstance the trial court ought not to have convicted the appellants. Secondly, he contended that the circumstance of last seen together is not squarely and fully proved by the prosecution and the only evidence of PW 1 led by the prosecution to prove the said circumstance and relied by the trial court is not corroborated nor does the evidence of PW 1 inspire any confidence.

6. After going through the evidence of PW 1 Laxman who is the main witness, we had also gone through the finding of the trial court which is based on the solitary circumstance of the accused having been last seen together in the company of the deceased by PW 1. The trial court has not considered the conduct of the said witness nor the fact that his evidence is contradicted by the other witnesses in essential particulars.

7. It is not in dispute that the only

circumstance relied on by the prosecution is that the deceased was seen in the company of the appellants for the last time and thereafter the dead body of the deceased was recovered. We have no doubt in our mind that if the said circumstance is proved beyond reasonable doubt, the accused can be convicted for the offence of murder on the basis of the said circumstance. However, after perusal and scrutiny of the evidence of PW 1 we find that his evidence with regard to his having seen both the accused in the company of the deceased does not inspire any confidence.

8. According to the said witness he was residing in Girgaum, Bombay while deceased Ashok, who was his brother, was residing in Santacruz-Khar area along with his sister Gangubai and her husband Ganu. According to him he used to visit Ashok and Gangubai fortnightly. He used to visit Ashok also at the grocery shop where he was working along with his brother-in-law i.e. Gangubai’s husband Ganu. On 10/11/1981 he was told by accused no.1 Maruti that Ashok used to tease his sister and, therefore, witness should warn Ashok to behave properly. This warning was given to him when he was going to the residence of Ashok on 10/11/1981 when he came across accused nos.1

and 2 near the bridge. Thereafter he went to Gangubai's house where Ashok was residing and had meal along with Ashok and Ganu. That time he did not tell him about the warning given by accused no.1 Maruti. After taking lunch at about 12.30 p.m. when he was coming from the residence of Ashok he met accused nos.1 and 2. The accused told him that they could remove the evil spirit possessed by Ashok by use of sour lemon and, therefore, he was asked to bring Ashok near railway bridge on that day for the said purpose. When witness did not agree to bring Ashok there for that purpose, Maruti pointed knife at his left rib cage and threatened that if Ashok was not brought, two children of Gangubai would be killed. Then he was taken to the railway station by the accused persons and again threat was held out to him. Thereafter he boarded the train in order to return to his residence at Girgaum. He was not in good state of mind and, therefore, he bought a ticket for movie "Kranti" which was exhibited in the nearby theatre. The witness saw movie for some time and left the movie half way because of the threat held out by the accused for murder of his nephews i.e. Gangubai's children. He then returned to Khar and went to the grocery shop where Ashok was working between 5 p.m. and 6 p.m. He told Ashok that Maruti and his brother-in-law would do

"Utara" and for that purpose he would be required without telling him about the threat held out by the accused. Ashok agreed to go for the said purpose but he went to his residence first saying that he would come for "Utara". Then again on his way he met accused persons when accused no.1 inquired about Ashok. Maruti, accused no.1, asked him to bring three lemons from the old man sitting nearby. He brought three lemons and in the meantime Ashok came there. Thereafter Ashok was taken in the dark by the accused persons and witness was asked to wait there near a wall. It was about 7 p.m. He was waiting there for 15 to 20 minutes. Thereafter both the accused returned. When the witness inquired about Ashok, the accused told him that "Utara" has been done and he would come within five minutes. Then both the accused asked him to go home and did not allow him to wait there till Ashok came back. Both the accused took him to the railway station. He then boarded the train and went home at Girgaum, had a dinner and went to bed and next morning he attended his duty. He learnt about the death of his brother Ashok only when in the evening police accompanied by his brother-in-law Ganu called him at his residence after he had returned from his work. Then he was taken by the police to Khar railway bridge. He saw dead body lying on the ground

with his throat slit. Then he was taken to Bandra Railway Police Station and his statement was recorded.

9. Now so far as the evidence of this witness is concerned, it is important to note that PW 6 Anand Salia, in whose shop deceased Ashok was working, has stated that on 10/11/1981 i.e. the day of the incident, Ashok left for lunch and while leaving for lunch he had told him that he had some work of Lord (Bhagwan) and, therefore, he would not return to the shop in the afternoon for duty and he would not report for duty on the next day also. As against that PW 1 has deposed that on 10/11/1981 he had gone to the grocery shop where Ashok was working between 5 p.m. and 6 p.m. and told him that he had to go to Maruti and his brother-in-law for "Utara". PW 1 has denied that he had told Ashok about this at the time of lunch in the house of Gangubai where he took meals along with deceased Ashok and Ganu. PW 6 the employer has deposed that Ashok told him that he would not return in the afternoon and the next day because he had some work of Lord (Bhagwan). Secondly, according to the evidence of PW 6 the employer of Ashok, Ashok had told him that he would not attend the duty in the afternoon but PW 1 states that he met him at his work place between 5 p.m. and 6 p.m. PW 2 Gangubai in her

deposition states that on the date of the incident i.e. 10/11/1981 Ashok and her husband Ganu had come home for lunch and after the lunch her husband had again gone back to work but Ashok remained at home. Thus, the evidence of PW 1 that he had gone and told Ashok between 5 p.m. and 6 p.m. that he had to go to accused no. 1 for the purpose of "Utara" is contradicted by his sister Gangubai PW 2 as well as by PW 6 Anand Salia, the employer of Ashok. Secondly, Gangubai in her deposition states that Ashok had remained in her house upto 6 p.m. on that day and at 6 p.m. he went out and he was followed by Maruti, accused no.1. As against that PW 1 has deposed that in the evening when he met accused persons on that day, accused no.1 inquired about Ashok and when they were together near Khar railway station, Ashok came. This means Ashok was not followed by Maruti which is the solitary sentence put in the mouth of Gangubai, PW 2, sister of the deceased and witness Laxman PW 1.

10. Apart from these two contradictions which in the context become relevant and important, there is no coherent evidence with regard to the incident in question. PW 1 had met accused persons three times on that day and on all occasions he states that he met accused persons on the way. According to PW 1 he used

to visit his brother and sister fortnightly and on 10/11/1981 he had visited his sister's house where Ashok was also staying. He had joined Ashok and his brother-in-law Ganu for meals. Before going there, accused met him who asked him to warn Ashok not to tease sister of accused no.1. When he went to the house of Gangubai and had meals (lunch) with Ashok and Ganu he did not tell Ashok about the said warning. After lunch he leaves that house but both the accused again met him on the way as if all the time they were keeping watch on the movements of the witness and Ashok. That time threat was held out that if he did not bring Ashok for the purpose of "Utara" then his nephews would be killed.

11. Thus on the day of the incident PW 1 goes back home at Girgaum and goes for a movie but becomes restless and, therefore, leaves movie half way and thereafter goes to see Ashok at his work place though according to Gangubai Ashok was at his house on that day after the lunch right upto 6 p.m. That apart, when Ashok was taken in the darkness by the two accused persons who were carrying knife in their hand which was pointed at the witness earlier, he does not wait for the return of Ashok after the alleged

"Utara". May be because accused took him to the station, therefore, he boarded the train and went home. Before the event he was feeling restless and, therefore, wanted to see a movie which also he could not see fully because of his anxiety, as he had the apprehension that something untoward might happen. Since the accused had held out threats earlier and were wielding knife and had taken Ashok in the darkness and returned without knife and Ashok, the anxiety of the witness should have increased and, therefore, he should have again gone back, the same evening, to see Ashok, but he goes home, takes meal and goes to sleep and next day even he attends his duty and comes back home without bothering to make enquiry whether Ashok had returned home or not. This conduct on the part of the witness is absolutely unnatural. The person who knew that there was some apprehension and danger does not bother to make enquiry about his own brother whether he had returned home or not. After accused had left the place he could have very well gone to the same place where his brother Ashok was left to see him or atleast gone to his sister Gangubai’s house to find out whether Ashok had returned home or not. But he does not bother to make any enquiry about him and he was told about the murder of his brother Ashok when police along with his

brother-in-law Ganu visited his house next day evening. This unusual and unnatural conduct on the part of the witness coupled with the contradictions in his evidence on the vital aspects of the matter and his deposition about meeting the accused on his way not once or twice but three times coincidentally as if the accused were all the time waiting near the place of incident to see this witness raises doubts whether this witness had really seen the accused persons or the deceased lastly in the company of the accused persons. These vital questions were not at all touched upon or considered by the trial court. Since the only circumstance on which the trial court has based the conviction is that deceased was seen in the company of the accused lastly and thereafter his dead body was recovered, without any corroboration, we have to consider the conduct of this witness as well as the contradictions which appear in the deposition of this witness and the evidence of his sister Gangubai PW 2 and Ashok’s employer PW 6 as to where Ashok was in the afternoon of the date of the incident after taking meals.

12. So not only the conduct of this solitary witness against the accused is unnatural but his

evidence also does not inspire confidence because of the contradictions on material aspects found in his evidence with that of the evidence of his sister Gangubai PW 2 and PW 6 the employer of deceased Ashok coupled with the vagueness with which he has deposed that the accused persons had met him three times on that day on his way as if coincidentally. It is also not clear as to why this witness had to go to Gangubai's house on 10/11/1981 and not attend his duties. The date of incident i.e. 10/11/1981 is stated to be Tuesday which is normally a working day. It has not also come on the record whether PW 1 was having holiday on that day and therefore he had gone to visit his sister and brother at Santacruz-Khar, Bombay. He has deposed that he had attended his duty on the following day and he has not stated whether he had holiday on 10/11/1981. There is no recovery of the knife or any other weapon used in the commission of the offence. The learned defence counsel has argued that from the evidence of Investigating Officer it appears that there is not even an attempt made to recover the weapon used in the commission of the offence.

13. All these aspects raise doubts about the truthfulness of the deposition of PW 1 as regards the

deceased having been last seen in the company of the accused persons. In our view it is very unsafe to rely on the solitary evidence of PW 1 on the circumstance of deceased last seen in the company of the accused in view of the unnatural conduct of PW 1 and the vague evidence given by him so also contradictions on material points. The appellants-accused are, therefore, entitled for benefit of doubt and acquittal.

11. In the result, we allow this appeal and quash and set aside the order of conviction and sentence recorded against the appellants by the Addl. Sessions Judge, Gr. Bombay in Sessions Case No.177 of 1982 by the Judgment and Order 30th March 1994 and acquit both the appellants of the charge levelled against them. The bail bonds of both the appellants shall stand cancelled.

(S.S. Parkar, J.)

(S.R. Sathe,J.)